May 22. 1829.

Appellants' Authorities.—Paisley, Jan. 13. 1779, (8228.); University of Glasgow, Nov. 18. 1790, (2104.); Philip, Feb. 21. 1809, (F. C.); M'Laggan, Nov. 19. 1813, (F. C.); Hammond, June 24. 1812, (F. C.); Taylor, Nov. 20. 1817, (not reported); 3. Wilson's Reports, 530.; 7. T. R. 254.; Fell on Guarantee, p. 126., &c.; 1. Starkie, Rep. 193.; 2. Bell's Com. p. 237.; Devaynes *v.* Noble, 1. Merivale's Rep. p. 605.; Reid, Jan. 29. 1792, (6818.); 6. Dow, p. 238.; Thomson, Jan. 29. 1822, (1. Shaw and Ballantine, No. 319.): reversed in House of Lords, (2. Shaw, p. 316.); 3. Ersk. 4. 2.; Buccleuch, Feb. 1725, (6807.)

Respondents' Authorities.—Spiers, June 22. 1822, (1. Shaw and Ball. No. 566.); Booth, May 16. 1823, (2. Shaw and Dunlop, No. 290.); Mansfield, June 9. 1749, (8224.); Hamilton, June 13. 1766, (8227.); Ewing, June 2. 1808, (App. voce Letter of Credit); 1. Bankt. p. 487.; Forbes, Nov. 9. 1739, (6813.); Cochrane, June 22. 1821, (1. Shaw and Ball. 103.)

RICHARDSON and CONNELL—GREGSON and FONNEREAU,—Solicitors.

No. 26. ALEXANDER AND WILLIAM MALCOLMS, Appellants.
T. H. Miller—Rodger.

THOMAS YOUNG, Respondent.

Lease—Assignation—Bona et mala fides.—Circumstances under which it was held, ex parte, (reversing the judgment of the Court of Session), that an assignation of a building lease by a father to his sons was not collusive, and therefore sustained in a question with a creditor of the father.

June 5. 1829.

1ST DIVISION. Lord Eldin.

ARCHIBALD MALCOLM, in 1807, obtained from Crawford of Auchnames a building lease, for 999 years, of two pieces of ground in the village of Port-Crawford in the county of Ayr. In 1809, Malcolm borrowed L. 120 from Robert Montgomerie, repayable in 1813, and assigned the lease to him in security. Malcolm remained in possession; but the assignation was published at the market-cross of Ayr, and registered in the Sheriff books of the County, but was not intimated to the landlord. On the 14th November 1814, Malcolm, with consent of Montgomerie, sold the lease to Malcolm's two sons, Alexander and William, for L. 160. They stated, that they were upwards of forty years of age, and had borrowed L. 100 of this money, to prevent Montgomerie from selling the lease to a stranger, which he had threatened to do. They resided in family with their father, who they said was now an old man. The deed, which was an assignation written 'by the said Archibald Malcolm, acting as 'clerk to David Brydon, writer in Saltcoats,' and concurred in by Montgomery, bore, that the sons had paid the amount to

the father; and Montgomery acknowledged receipt, and discharged the L.120 borrowed from him. The warrandice was from fact and deed only. June 5. 1829.

The assignation was recorded in the Sheriff Court books, and the sons alleged that they enjoyed the possession ostensibly; but they admitted that their father resided in the house along with them. The receipts for the rents were in their names; and in February 1816 they granted an assignation of the lease in security to the person from whom they had borrowed the L. 100, which was also recorded. In the meanwhile the father had, in 1812, granted a bill for L. 72 to Mr Crawfurd Tait, W. S. who indorsed it to his partner Mr Young, by whom an adjudication of the lease was in 1817 raised against the father.

The father entered defences, and the sons also appeared as defenders; but, (as was alleged), being unable from poverty to present an effective defence, decreet of adjudication in absence was pronounced in May 1820. Young having made the father a bankrupt, brought an action of reduction to set aside the assignation in security to Montgomery, and the after conveyance to the sons, alleging that these deeds had been latent—never intimated—granted retenta possessione to conjunct and confident persons, without any true, just, or necessary cause, or without any fair price, when the granter was in a state of insolvency, with a view to defraud the pursuer and other lawful creditors; and therefore reducible under the Acts 1621, c. 18. 1696, c. 5. and 54. Geo. III. c. 137. Decree in absence was pronounced; and Young thereupon raised a process of removing against the same parties.

The sons now instituted an action of reduction of these decreets, alleging that the assignation was valid, granted for an onerous consideration, and with perfect bona fides; and at the same time they brought a suspension of the decreet of removing. Lord Mackenzie found, 'that there was no evidence or 'reasonable ground for presuming, that the assignation in security 'of the lease of Archibald Malcolm in favour of Montgomery, 'or the assignation of Archibald Malcolm, with consent of 'Montgomery, to Alexander and William, sons of Archibald 'Malcolm, was fraudulent in any respect; but, on the contrary, 'there is reasonable evidence, proving that both of these assig-'nations were made bona fide, and for a full consideration;—that 'the lease having been thus bona fide and onerously assigned by 'Archibald to his sons, the possession by them was sufficient to 'exclude the pursuer from having right to obtain the decree of

June 5. 1829. ‘ reduction, or to obtain the decree of adjudication, as valid or ‘ effectual against them;’ and therefore reduced and suspended. Lord Eldin (having succeeded Lord Mackenzie as Lord Ordinary) altered, and repelled the reasons of reduction, and found the letters orderly proceeded in the suspension; and the Court adhered, with expenses.*

The Malcolms appealed. No appearance was made for Mr Young.

On *Miller*, for the appellants, opening the case,—

Lord Chancellor.—The appellant has done his duty, and appeared; but the absence of the respondent is really throwing a burden on the house, especially where the matter relates to Scotch law. I see nothing in the papers shewing the want of bona fides. Lord Mackenzie gives his reasons, and finds bona fides. Lord Eldin alters, but gives no reasons;—were there any reasons assigned by the Court?

Miller.—In a very short report of the case, (3. Shaw and Dun. No. 281.), the Court is represented as holding the transaction to be collusive. But the facts of the case altogether exclude such an inference.

Lord Chancellor.—As there is no respondent here, the proper way to proceed will be for your Lordships to look into the papers in the cause, and say on a farther day what your Lordships consider ought to be done.

Miller.—The appellants are too poor to be able to get a copy of the record; but we have the record itself, and we shall produce it if desired.

Lord Chancellor.—In particular circumstances, we allow the indulgence of no copy being produced. If necessary, we shall call for what you have.

The House of Lords ordered and adjudged, that the interlocutors complained of be reversed.

JAMES MOODY TAYLOR,—Solicitor.

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* 2. Shaw and Dun. No. 146. p. 158., and 3. Shaw and Dun. No. 281. p. 388.